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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

CHARLES MARCH CHRISTENSEN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the government work-product privilege, codified in Rule 16(a)(2) of the Federal Rules of Criminal Procedure, is waived by the voluntary disclosure of Special Agent Reports to the government's adversaries.

2. Whether the Court of Appeals has the authority to assume the district court's role as fact finder and determine the existence or terms of an alleged informal discovery agreement.

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Charles March Christensen, James Scott Mann, III, Peter K. Gallaher, William M. Moore, and Julian C. Alsup and the respondent, the United States of America. In the interim between the judgment of the Fifth Circuit and the filing of this petition, Mr. Alsup has died and the government has dismissed all charges against him. This petition is filed solely on the behalf of Mr. Christensen.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHARLES MARCH CHRISTENSEN, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Charles March Christensen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on August 3, 1995 in the proceeding entitled United States of America v. Mann, et al.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 61 F.3d 326 (5th Cir. 1995) and is reprinted in the appendix hereto, p. 1D, infra. The Fifth Circuit's slip opinion denying a rehearing en banc was issued on September 21, 1995 and is reprinted in the appendix hereto, p. 1E, infra.

The orders of the United States District Court for the Western District of Texas (Sparks, D.J.) relevant to this matter were entered on December 20, 1993, December 29, 1993, and January 3, 1994 and have not been reported. These orders are reprinted in the appendix hereto, See pp.1A, 1B, 1C, infra.

JURISDICTION

On June 30, 1993, the federal grand jury for the Western District of Texas handed down a superseding indictment against Mr. Christensen for various violations of Titles 18 and 26 of the United States Code. On January 3, 1994, the district judge dismissed the indictment as a sanction against the government for failure to comply with court ordered discovery. See p. 3C, infra.

The government's appeal to the Fifth Circuit was brought under 18 U.S.C. Section 3731. On August 3, 1995, the Fifth Circuit remanded this cause to the district court for trial. See p. 22D, infra. On September 21, 1995, the Court of Appeals denied Mr. Christensen's petition for rehearing en banc. See p. 2E, infra.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. amend V.

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

Fed. R. Crim. P. 16(a)(2).

> Except as provided in paragraphs (A), (B), (D), and (E) [not involved in this case] of subdivision (a)(1), this rule

does not authorize the discovery or inspection of report, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.

STATEMENT OF THE CASE

The events underlying this case began approximately thirteen years ago, in 1982. The government filed a second superseding indictment against Mr. Christensen, Gallaher, Moore, Alsup, and Mann on June 30, 1993. (1 R. at 73-125). The Honorable Judge Sam Sparks, of the Western District of Texas, scheduled trial to begin on January 4, 1994. The district court, however, dismissed the indictment on January 3, 1994, as a sanction for the government's failure to comply with discovery orders. The government failed to comply with the court's order requiring the government to provide the petitioner with access to two Special Agent Reports ("SARs") filed by officers of the Internal Revenue Service.

The issue that directly led to the dismissal and ultimately this petition had its origin at a September 24, 1993 hearing. Prior to the filing of the initial indictment in 1991, the United States Attorney had voluntarily allowed the defendants and their counsel to view, inspect, and take notes on, but not copy, the documents in the government's possession, including the SARs at issue. This policy was terminated in July of

1992. Since that time, the defendants have requested access to the SARs, which the government has denied, asserting work-product privilege. The government has asserted that the discovery framework was violated. (12 R. at 37-38). The government has also admitted that access was terminated because the defendants were unlikely to plead guilty. (12 R. at 38, 44, 83). The defendants have countered that such any privilege was waived by voluntary disclosure. The court ordered the government to produce the requested documents, subject to an appropriate protective order. (10 R. at 21-22). When the government refused, the case was dismissed.

The government appealed the dismissal to the Fifth Circuit Court of Appeals, and on August 3, 1995, the court reversed the dismissal and remanded the case to the district court. United States v. Mann, 61 F.3d 326 (5th Cir. 1995). After denying a request for a rehearing en banc, this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT'S MISINTERPRETATION AND MISAPPLICATION OF THIS COURT'S PREVIOUS RULINGS AFFORDS THIS COURT AN IMPORTANT OPPORTUNITY TO CLARIFY CRIMINAL DISCOVERY.

The Fifth Circuit Court of Appeals blatantly disregarded this Court's holdings in United States v. Nobles, 422

U.S. 225, 95 S.Ct. 2160, (1975), and United States v. Mezzanato, ___ U.S. ___, 115 S.Ct. 797 (1995). Nobles established that the work-product privilege applies in criminal cases and that the privilege is waivable. Nobles, 422 U.S. at 238-39, 95 S.Ct. at 2170. The Fifth Circuit claimed that Nobles did not apply in this case. See pp. 29D-30D, infra. In Mezzanato, the Court stated that the provisions of the Federal Rules of Criminal Procedure are presumptively waivable. Mezzanato, ___ U.S. at ___, 115 S.Ct. at 801-02. Again, this holding indicates that the government's claim of privilege under Rule 16(a)(2) of those rules is waivable. Mr. Christensen is not asking for any additional disclosures by the government, but merely to view those materials which were already provided to him. This Court should grant certiorari to reinforce its mandates in Nobles and Mezzanato and clarify the role and nature of the waiver doctrine in federal criminal trials.

The Fifth Circuit erroneously concluded that the work-product privilege and its waiver doctrine do not apply to reports produced by government agents. The Fifth Circuit acknowledged the existence and basic principles of Nobles, but chose to ignore the application of those principles to this case. The court below effectively overruled Nobles and stated that it does not apply in the Fifth Circuit. Such a drastic departure from this Court's jurisprudence requires the attention of the Supreme Court.

In United States v. Nobles, this Court held that the work-product doctrine applied in criminal litigation. Nobles, 422 U.S. at 238-39, 95 S.Ct. at 2170. The

Court also indicated that protections of the work-product doctrine have been extended to the files of both the prosecution and the defense. Id. at 238 n.12, 95 S.Ct. at 2170 n.12. Furthermore, the Court acknowledged that the privilege not only shelters the product of the attorneys, but also "material prepared by agents for the attorney[.]" Id. at 238, 95 S.Ct. at 2170. Finally, the Court also specified that "The privilege derived from the work-product doctrine is not absolute. **Like other qualified privileges, it may be waived.**" Id. at 239, 95 S.Ct. at 2170 (emphasis added).

Rule 16(a)(2) of the Federal Rules of Criminal Procedure was a Congressional attempt to codify the work-product privilege announced in Nobles. Fed. R. Crim. P. 16 advisory committee's note; 121 Cong. Rec. 23,320, 23,324 (statement of Sen. McClellan). Neither the Congress, the Supreme Court, nor the Advisory Committee indicated that the amended Rule in any way altered or modified the Nobles holding.

Under Nobles and under Rule 16(a)(2), the SARs are work-product. See Nobles, 422 U.S. at 238-39, 95 S.Ct. at 2170. This Court has held that the work-product privilege is waivable. "[P]rovisions of those rules [the Federal Rules of Criminal Procedure] arepresumptively waivable." United States v. Mezzanato, ___ U.S. ___, 115 S.Ct. 797, 801 (1995). By voluntarily allowing the defendants to view and examine the reports in question, the government waived its privilege. It is nonsensical for the government to argue that documents to which Mr. Christensen has already had access, are secret

documents that he can no longer see. Neither the government nor the Fifth Circuit can be allowed to put the genie back in the bottle.

The Fifth Circuit clearly misapplied Nobles and ignored the legislative history behind Rule 16. While Nobles factually did address only a defendant's work-product, the court below ignored this Court's statements that the privilege is a two-way street. The privilege applies to both the defense and the government. Nobles, 422 U.S. at 238 n.12, 95 S.Ct. at 2170 n.12. This Court in Nobles and Mezzanato also stated that the work-product privilege is waivable. Id. at 239, 95 S.Ct at 2170; Mezzanato, ___ U.S. at ___, 115 S.Ct. at 801. If the privilege applies to the government, so should the waiver principle. There is no indication in the Rule itself, in the advisory committee notes, or in the legislative history that the codification of the work-product principle in any way diminishes the Nobles holding. Rather, the legislative history shows that Congress specifically had Nobles in mind when it considered the amendments to Rule 16, including the passages addressing agent work-product. 121 Cong. Rec. 23,324 (statement of Sen. McClellan)(quoting Nobles, 422 U.S. at 238-39, 95 S.Ct. at 2170). Since Congress' purpose was to codify the work-product privilege and based that codification to some degree on Nobles, Congress must have also intended to incorporate Nobles' statement that the privilege is not absolute, but in fact waivable. But the Fifth Circuit chose to disregard this Court's teachings in Nobles as well as the policy underlying the Rule

as expressed by its legislative history.

This Court should exercise its jurisdiction to correct the error of the Court of Appeals and reaffirm its position as stated in Nobles The Fifth Circuit's holding is also in conflict with the decisions of other courts which have addressed the work-product waiver issue, See, e.g., In re Subpoena Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984); In re Chrysler Motors Corp. Overnight Evaluation, 860 F.2d 844, 846-47 (8th Cir. 1988); Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991). Additionally, this case provides the Court with the chance to further explain and establish the rules of discovery in federal criminal cases.

II. THE FIFTH CIRCUIT USURPED THE DISTRICT COURT'S ROLE AS FACT FINDER AND ERRONEOUSLY SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE DISTRICT COURT.

The federal district courts, as the level with the greatest access to the litigants is best suited to handle evidentiary issues and is given the primary responsibility of fact finder. A court of appeals may only reject the findings of the district court if those findings are clearly erroneous. Campbell v. United States, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360 (1963).

A. The Fifth Circuit erred in basing its decision on the alleged existence of an "informal discovery agreement" because the court relied solely on correspondence and documents not entered into evidence at the district court.

The Fifth Circuit Court of Appeals referred to an "informal conditional agreement" throughout its opinion. The implication is that the record clearly supports that such an agreement did in fact exist. But the court admitted that "the record does not contain a formal agreement governing access to these documents and the agents' reports, [but] the record reflects that early in the discovery procedure certain 'rules of engagement' were established." See pp. 6D-8D, infra. The "record" to which the government refers, however, consists of documents that were never offered into evidence at the trial court. An appellate court cannot make new findings on the basis of evidence not presented to the district court. Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1138 (5th Cir. 1983).

The Court of Appeals quoted from the government's responses to discovery requests to "establish" the existence of these so-called "rules of engagement." See pp. 6D-8D, infra. But these pleadings were never entered into evidence at the district court. The court is prohibited from relying on statements that were not evidence at the district court.

Furthermore, the court ignores the district court's finding that "it appears that once the government determined a Defendant would not plead guilty, the previously accessible documents were withheld." See p. 12B, infra. The findings of the Fifth Circuit are not supported by the record and appear to be in direct conflict with those of the district court.

B. The Fifth Circuit improperly substituted its own judgment for that of the district court by choosing its own definitions for the terms of the alleged informal discovery framework imposed by the government.

In its opinion, the Fifth Circuit concluded that Mr. Christensen had violated the terms of the alleged discovery framework. The alleged violation consisted of what the government asserted was "verbatim" copying of the SARs, which was supposedly prohibited. But the appellate court ignored the concerns expressed by the district court that even if there was a framework, the terms were unclear. District Judge Sparks specifically questioned the government's position that hand-written notes are the equivalent of copying. See p. 12B n.7, infra. Despite the district court's concerns, however, the Fifth Circuit merely accepted the government's position without seriously considering the definitional issue raised by the defendants. In fact, the Fifth Circuit "reject[ed] this argument out of hand."

See p. 18D n.7, infra. This cavalier approach to important and controversial issues that concerned the district judge is at the least improper, and borders on irresponsibility. The Fifth Circuit overstepped its authority, and in doing so denied Mr. Christensen his rights as guaranteed by the Due Process Clause of the United States Constitution.

The alleged agreement prohibited the "copying" of the SARs. See pp.8D-9D, infra. The section of the documents that imposes this condition is ambiguous:

> [t]he government will voluntarily allow all defendants in this cause to **examine and copy** evidence which the government has accumulated during its investigation. . . . The files are in the custody of Walter Mazur, Special Agent, Internal Revenue Service, Criminal Investigation Division. . . . **A copier is available** to the defendants' attorneys. A fee of 10 cents per page will be charged.
>
> The government has previously allowed attorneys to examine Agent Mazur's report. The government will continue to allow counsel to **review** the factual portion of the report, but the report **may not be copied**[.]

See pp. 8D-9D, infra (quoting government responses to various pre-trial motions by the defendants)(emphasis in the original responses). The implication is clear:

counsel for the defendants could not use the copier, but they were permitted to take notes. The government has never accused the defense counsel of using the copier provided by the government to copy the SARs. The only accusation is that the defense took "verbatim notes" of the records, which the Fifth Circuit read as violating the "copying" prohibition. But the defense was permitted to take notes, and that is precisely what they did; they should not be sanctioned for doing what they were permitted to do. The district court also expressed concern over the ambiguous nature of this alleged violation: "The Court is unsure of the degree of copious note-taking required to cross the line to verbatim copying, much less how such a rule could be objectively applied." See p. 12B n.7, infra. The district judge, who was in the best conceivable position to determine the existence and terms of a discovery framework, was unconvinced by the government's argument. Additionally, the district court also expressed concerns about the due process implications of such an ambiguous standard that would be difficult to apply objectively. Id. For the Court of Appeals to merely dismiss these concerns "out of hand" is irresponsible and should not be permitted.

The Fifth Circuit exacerbated this error by imposing an extreme sanction for this alleged violation. The appellate court denied Mr. Christensen any further access to the documents which he had already seen. But in the documents to which the Fifth Circuit refers, there is no mention of any type of sanction for an alleged violation. Even according to the

government's version of the facts, this type of sanction is unwarranted. The proper sanction, if any, would be to require the defendants to hand over the alleged copies, but not to deny access to documents that the defendants have already seen. In Mezzanato, once plea negotiations had broken down, the government could no longer compel any further admission by the defendant, but the government was permitted to use the information it had already acquired. Similarly, in this case, Mr. Christensen is not asking for any further documents, but merely to have renewed access to information that was already provided to him. Even in the Fifth Circuit's interpretation, which Mr. Christensen challenges, the imposition of a draconian sanction is unwarranted for what is at most a semantic difference.

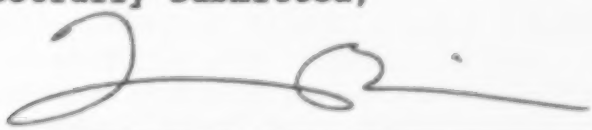
This Court should grant the petition for certiorari to remedy the Fifth Circuit's overreaching and arbitrary actions reversing the district court.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals has ignored this Court's teachings in United States v. Nobles and United States v. Mezzanato. Furthermore, the Fifth Circuit has usurped the role of the district court as fact finder and by doing so has denied Mr. Christensen his constitutional rights. Mr. Christensen is merely seeking access to documents that were already provided to him by the government. This Court should exercise its jurisdiction to reassert its authority and the principles it established in those

earlier cases. The writ of certiorari should also be issued to protect Mr. Christensen from an unconstitutional deprivation of his rights.

Respectfully submitted,



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APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. PETER K. GALLAHER, WILLIAM MARVIN MOORE, JULIAN CLIFFORD ALSUP, CHARLES M.CHRISTENSEN, JAMES SCOTT MANN, III, Defendants.	)	#A92CR129(1-5)SS

ORDER

Before the Court is the government's "Motion for Reconsideration of Order Directing Disclosure of Special Agents' Reports."[1] Having considered the motion, the evidence presented, and the arguments of counsel, the Court enters the following findings and order.

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[1]The "special agents' reports" referred to in the title of the government's motion were originally referred to as the government's "Trial Notebook." The government now describes the documents as special agents' reports.

I. Background

The issue raised by this motion has been before the Court in the [sic] some form in the last three pretrial motions hearings the Court had [sic] held on this cause. The Court, therefore, provides the following background pertinent to the motion now before the Court.

At a pretrial hearing on September 24, 1993, the Court addressed Defendant Moore's discovery motion that included a reguest for production of "[t]he three ring "Trial Notebook" believed to have been prepared by the I.R.S./F.B.I. for the United States Attorney and previously made available in June, 1992 to Defendant William Moore. See Motion by Defendant William Moore for Discovery and Inspection and Demand for Exculpatory Evidence, at 13. Defense counsel represented that he was tendered a "trial notebook" at the United States Attorney's office and allowed to review it and take notes there. He asserted, however, this was an inefficient process and he desired copies of the documents. The Assistant United States Attorney stated the notebook was work product and, while he disclosed it to defense counsel, he did not have to provide defense counsel with a copy because it was not discoverable. The Assistant United States Attorney also represented the notebook contained the case agent's work product -- reports

consisting of the agent's accumulation of evidence and subjective notes about the case, as well as confidential information relating to third parties not relevant to the indictment in this cause. See Sept. 24, 1993 Hearing Transcript, at 15. Accordingly, the Assistant United States Attorney expressed concern about widespread release of information of a sensitive and confidential nature. The Assistant United States Attorney stated he had "let everybody look at" the notebook "in an effort to get them in the case and to understand what we are doing."[2] TheAssistant United States Attorney stated he had ended the practice of allowing defense counsel to view the notebook when law clerks associated with defense counsel

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[2]The Assistant United States Attorney now represents the compilation of documents is two separate case agents' reports that are not discoverable or subject to waiver of the work-product privilege. Additionally, the Assistant United States Attorney now disclaims all counsel were provided access to the compilation of documents at his office. He suggests only counsel for Moore and Gallaher reviewed the documents and only certain documents were made available. See Letter from Blankinship to Sparks, Dec. 17, 1993.

began copying verbatim from the notebook. *Id.* at 16. The Court, in an effort to resolve the discovery dispute in a mutually satisfactory manner, dismissed Defendant Moore's motion without prejudice but stated defense counsel could inspect the book at the U.S. Attorney's offices. *Id.*; see *also* Court's Sept. 27, 1993 Order.

The issue of the notebook was again raised by Defendant Moore in his Motion for Discovery and Inspection and Copying of Exculpatory Evidence (Government's Trial Notebook), which was filed October 5, 1993. Defendant Moore again represented to the Court that the notebook had been shown to defense counsel, and accordingly, any work-product privilege had been waived by the government. At this time, the government represented to the Court that actually two notebooks were actually at issue. Upon the Court's oral ruling granting Moore's motion, the government reurged its concern about the sensitive and confidential nature of information regarding third parties contained in the notebooks. The Court instructed the government to present the notebooks to the Court for *in* camera inspection with a list or designation of the portions containing sensitive information so the Court could determine which portions, if any, should be redacted and what type of protective order should be issued.

By order signed November 23, 1993, the Court granted Defendant Moore's motion.[3] The Court also set a final pretrial motions hearing for December 17, 1993, to take care of any pending pretrial issues. The government presented the notebooks to the Court late on the

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[3]The Court's order states:

Defendant Moore's Motion for Discovery and Inspection and Copying of Exculpatory Evidence (Government's Trial Notebook) is GRANTED subject to the following procedure. The Government, by appropriately cooperating with defense counsel in the discovery process, has allowed the Defendants' counsel to inspect the notebook and, therefore, has waived any work-product privilege. However, many of the records in the notebook, which contain information related to third parties and speculation on behalf of government agents regarding third parties, require protection. Therefore, IT IS ORDERED that the United States Attorney present the notebook with an indication of the documents that require a protective order to the Court for *in camera* inspection before the notebook is presented to the Defendants' counsel for copying.

afternoon of Friday, December 10, 1993.[4] At that time, the Assistant United States Attorney represented that providing the Court with the requested list or designation was an impossible task because much of the information was so closely intertwined and interrelated. The Court, therefore, requested the Assistant United States Attorney to draft an appropriate protective order to be entered at the time of disclosure.

The government also filed its Motion for Reconsideration of Order Directing Disclosure of Special Agents' Reports on December 10, 1993, in which it expressly alleges the notebooks have been mischaracterized as trial notebooks but are, in fact, case agents reports exempt from disclosure under Federal Rule of Criminal Procedure 16(a)(2). In the pretrial hearing on December 17, 1993, the government again stated that defense counsel had been allowed to review the contents of the notebooks in the offices of the United States Attorney.

In open court on December 17, 1993, the Court orally denied the government's

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[4]One notebook contains the report of Special Agent Mazur in conjunction with his investigation of the five defendants. The other notebook contains the report of Special Agent Howard Brooks prepared in conjunction with the tax investigation of Defendant Mann

motion for reconsideration. Thereafter, the Assistant United States Attorney represented to the Court the government respectfully would decline to produce the two notebooks and would seek appellate review of the Court's ruling. The Court, faced with a trial date of January 4, 1994, asked the Assistant United States Attorney regarding the options available in light of the January 4, 1994 trial date.[5] The Assistant United

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[5]This multi-defendant, multi-count cause is extremely complex and has a convoluted history involving superseding indictments and a multitude of motions, including two defendants' motions to dismiss the cause for prosecutorial delay. The original indictment issued on September 13, 1991, under cause number A-91- CR-132, indicted Defendants Gallaher, Moore, Alsup, and Christensen. On November 18, 1991, Judge Garcia set the cause for trial on April 12, 1992. The cause was transferred to this Court and on March 16, 1992, and this Court set the cause for trial on July 6, 1992. On April 7, 1992, the government filed a superseding indictment adding Defendant Mann and a conspiracy count. On May 13, 1992, this Court reset the trial for August 17, 1992. On August 5, 1992, the government dismissed the cause.

States Attorney indicated that he had

The Government filed a new indictment against Defendant Mann under cause number A-92-CR-129 on August 14, 1992. The Court made trial settings in this cause of November 16, 1992; March 29, 1993; July 5, 1993; and July 6, 1993. On each occasion, the government advised the Court it was in the process of additional investigation and was pursuing a superseding indictment. Counsel for Defendant Mann alleged he needed six months to prepare for trial.

On June 30, 1993, a week after the Court set the July 6 trial date, the Government did file a superseding indictment against all five Defendants now before the Court. Based on counsels' representation in a September 24, 1993 pretrial motions hearing, the Court set this cause for trial on January 4, 1994.

The government and defense counsel have represented to the Court trial of the cause will take three to five months. The Court, despite a heavy criminal docket and Speedy Trial Act concerns on several causes, has blocked a period of time for trial of this cause that is mutually acceptable to all involved. The government and all Defendants have had ample notice of the January 4 trial date and have all agreed to it. The Court has made every effort to keep the cause on schedule by scheduling frequent pretrial motions hearings.

sought counsel from the appellate section of the Justice Department and was advised there was no interlocutory or expedited appellate procedure available, and the Court's options were contempt proceedings or dismissal of the cause. With either of these alternatives, the government would have the right to appeal, but no decision would be reached before January 4, 1994.

Late the afternoon of December 17 1993, the Court received a letter from the Assistant United States Attorney in which he stated the following:

> It occurred to the undersigned after the hearing today that only Defendant Moore had filed a motion to discover an agent report and that Moore's motion relates only to the portion of Special Agent Mazur's report that was previously revealed to Moore's attorney (I note that the motion refers to a single government "trial notebook"). I do not believe that the other defendants have pending motions for discovery of any agent report.

Also enclosed with the letter was a draft protective order relating only to Defendant Moore and Special Agent Mazur's notebook. The Assistant United States Attorney again asserted, however, that the government would not make disclosure and would seek appellate review of the Court's

ruling. To stay on schedule, the Assistant United States Attorney suggested that the trial could proceed concurrently with appellate review of the merits.[6]

II. Analysis

The government now argues the work-product doctrine and its exceptions do not govern discovery of case agents' reports in federal criminal cases because Federal Rule of Criminal Procedure 16(a)(2) specifically exempts the reports from disclosure.[7] In support of this argument,

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[6]The Assistant United States Attorney asserts that if an appellate ruling against the government is made before the conclusion of the trial, the government would immediately provide defense counsel with the report in question; if the ruling is in the government's favor, the Defendants would have suffered no harm. Trying a multi-month case under these circumstances is akin to hungry children finding Easter eggs in June.

[7]Federal Rule of Criminal Procedure 16(a)(2) states:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with

the government relies on one case that directly addresses Rule 16(a)(2), *United States V. Penix,* 516 F. Supp. 248 (W.D. Okia. 1961), and two federal civil litigation cases, *Shields V.* Strum, Ruger & Co., 864 F.2d 379 (5th Cir. 1989), and *United States V. American Tel.* & Tel. Co., 642 F.2d 1265 (D.C. Cir. 1980).

It is well-established that the work-product doctrine applies to criminal as well as civil litigation. See *United States V. Nobles,* 422 U.S. 225, 236-239, 95 S.Ct. 2160, 2169-2171 (1975). Further, the privilege derived from the doctrine is not absolute and can be waived. Id.

The government, however, contends the work-product doctrine does not apply in criminal cases to work-product protected under Rule 16(a)(2), and cites *Penix* to support its contention. In *Penix,* an Oklahoma district court held, despite a disclosure of the prosecution's work product to third parties that might have waived any work-product privilege, pretrial disclosure of the government's entire case file was exempted under Rule 16(a)(2). The court stated no factual basis for the ruling and provided no legal analysis other than the movant presented

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the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C.s 3500.

no authority to the contrary.[8]

This Court does not find *Penix* to be persuasive authority in this case. Without benefit of factual background and legal analysis, the Court declines to accept *Penix* for a general rule that a disclosure does not result in the government's waiver of work product described in Rule 16(a)(2). Further, the Court notes an important factual difference between *Penix* and this cause -- the disclosure in *Penix* was to third parties, not adversaries as in the cause now before this Court. Under general work-product doctrine, whether disclosure to a third party waives the privilege is a factually based determination. Additionally, the Court is bound under the Supreme Court's holding in *Nobles* to apply work-product doctrine to criminal litigetion.[9] The Court is aware of no

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[8]As the government points out in its motion for reconsideration, Defendant Moore has provided no legal authority to support his argument that the government waived any work-product privilege by showing the notebooks to the Defendants.

[9]In *Nobles,* the Court stated: "Although the work-product doctrine most frequently is asserted as a bar to discover in civil litigation, its role in assuring the proper functioning of the

Supreme Court case or case from this Circuit that carves an exemption from the work-product doctrine for Rule 16(a)(2) materials.

The government also relies on cases in federal civil litigation where the work-product privilege has withstood waiver arguments. However, these cases base their reasoning on judicially compelled disclosure and disclosure to third parties, not adversaries. See *Shields,* 864 P.2d at 382 (compelled disclosure of privileged work-product despite objection in one court does not waive privilege for same work-product before another court) *American Tel. & Tel.*, 642 F.2d at 1299-1300 (disclosure to a third party with a common interest against a common adversary does not waive the work-product privilege).

"The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation." *American* Tel. & Tel. Co., 642 F.2d at 1299. Therefore, while a showing of voluntary disclosure to a third person is generally sufficient to show waiver of the attorney-client privilege, it will not suffice in

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criminal justice system is even more vital." 422 U.S. at 238, 95 S.Ct. at 2170.

itself for waiver of the work-product privilege. *Id.* As long as the transferor and the transferee have common interests on a particular issue against a common adversary, disclosure will not waive the privilege. *Id.*

Absent this common interest between transferor and transferee, however, the rationale behind the protection does not apply. See, e.g., *In* re *Subpoenas Duces* Tecum, 738 F.2d 1367 (D.C. Cir. 1984) (corporation that voluntarily disclosed material to SEC to convince SEC that formal investigation not warranted could not later assert protection of the same documents under work-product privilege against different adversaries on the same matters disclosed to the SEC). When a party makes disclosure of documents to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not subsequently be able to claim the protection of the work-product doctrine. *In* re *Chrysler* Motors Corp. *overnight Evaluation* Program *Litig.*, 860 F.2d 844 (8th Cir. 1988); *In* re Doe, 662 F.2d 1073 (4th Cir. 1981), *cert. denied,* 455 U.S. 1000, 102 S.Ct. 1632 (1982); *American Standard, Inc. V. Bendix* Corp, 71 F.R.D. 443, 446 (W.D. Mo. 1976); see also 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and* Procedure s 2024, at 210 (1970 ed.) ("[D]isclosure of a document to third person does not waive

the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information.")

In this cause, the Assistant United States Attorney has twice admitted in open court the government voluntarily provided its adversaries, the Defendants, with access to a compilation of documents. The government now contends the documents disclosed comprised Special Agent Mazur's report. Therefore, for the first time, there exists a need for an evidentiary hearing to determine what was made available to whom.

Although the Federal Rules of Criminal Procedure do exempt case agents reports and other government work product from disclosure, this Court finds no persuasive authority that this exemption is absolute. The government's disclosure was inconsistent with the purpose of the work-product privilege, to maintain secrecy in trial preparations against opponents. Further, it is nonsensical and an inefficient use of time in a complex case involving thousands of documents to require the Defendants to go to the United States Attorney's office to read and make notes from documents the government has voluntarily shown the Defendants, rather than simply provide the Defendants a copy subject to a protective order.

Accordingly, this Court finds the government waived its work-product

privilege with regard to the documents disclosed to the Defendants and must produce the documents for inspection and copying, subject to the protective order set forth below.

III. Conclusion

When the Court orally denied the government's motion to reconsider, the Assistant United States Attorney provided the Court with notice that the government would respectfully decline to produce the documents to the Defendants and would, therefore, intentionally refuse to comply with this Court's orders.[10] The government, as admitted in open court on December 17, 1993, has deliberately forced the Court to either dismiss the cause or hold counsel in contempt for failing to comply with Court orders. While the Court is tempted to dismiss under the circumstances, it will not do so and enters the following orders:

IT IS ORDERED that the government's "Motion for Reconsideration of Order Directing Disclosure of Special Agents' Report" is DENIED and copies of the documents the government admits have

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[10]The Court first ordered disclosure by order signed November 23, 1993. The Court orally ordered disclosure on December 17, 1993, and formally enters that disclosure order today.

been disclosed to defense counsel be made available to defense counsel on or before December 28, 1993, at 1:00 p.m. The defense counsel receiving copies of the documents shall, at the time of receipt of the documents, execute a document evidencing receipt of the documents. The Defendants and their counsel are instructed that the information contained in the documents is to be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever. None of the information contained in the documents is to be disclosed to any third party or person without order of this Court. Any individuals assisting defense counsel in the preparation and trial of the case are bound by this protective order, and counsel is ordered to so instruct any person assisting in the defense of any client. The documents and any information contained in them is not to be reproduced or copied in any manner. The documents are to be returned to the United States Attorney's office upon final judgment of the cause.

IT IS FURTHER ORDERED that an evidentiary hearing is set for December 28, 1993, at 1:00 p.m., in which the government shall establish by appropriate evidence the specific documents that have not been disclosed to counsel and, therefore, that the government objects to disclosing to the Defendants. IT IS

FURTHER ORDERED that the Assistant United States Attorney report to the Court at that time what documents have been disclosed to defense counsel in compliance with this order.

SIGNED this the 20th day of December 1993.

s/_____
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

FILED DEC 29 3:14 PM '93 U.S. CLERK'S OFFICE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	#A92CR129(1-5)SS
PETER K. GALLAHER, WILLIAM M. MOORE, JULIAN C. ALSUP CHARLES CHRISTENSEN, JAMES S. MANN, III,	)	
Defendants.	)	

ORDER

On December 28, 1993, the Court held an evidentiary hearing to determine what portions, if any, of documents designated as special agents' reports had been voluntarily disclosed by the government to the Defendants and which Defendants had received the disclosure. The need for this hearing stems from an issue that has been before this Court in some form since September 1993, as outlined in the Court's order signed December 20, 1993: Whether the government must now produce special agents' reports to the Defendants for inspection and copyinq when the documents were previously voluntarily

disclosed to the Defendants for inspection without limitation, save verbatim copying. The Court ruled, for the reasons set forth in its December 20, 1993 order, that the documents must be produced to the Defendants for inspection and copying. The Court, having heard the evidence presented by the government and defense counsel in the evidentiary hearing, affirms the ruling as expanded by this order and enters the following findings and order:

This case has a long and tortured history. The original indictment issued on September 13, 1991 under cause number A-91-CR-132 and indicted Defendants Gallaher, Moore, Alsup, and Christensen. On November 18, 1991, Judge Garcia set the case for trial on April 12, 1992. The case was subsequently transferred to this Court in January 1992, and, at the request of the parties, the Court set a trial date of July 6, 1992. That trial date was continued as a result of a superseding indictment filed on April 7, 1992, which added Defendant Mann. On May 13, 1992, the Court again set a trial date of August 17, 1992 and subseqoently refused the government's request to continue the trial, noting the case was approaching one year on the docket. To avoid the August 17, 1992 trial date, the government dismissed the indictment in A-

91-CR-132 on August 5, 1992. Approximately a week later, on August 14, 1993, the government obtained a new indictment against Defendant Mann in this cause. The Court made trial settings in the cause of November 16, 1992; March 29, 1993; July 5, 1993; and July 6, 1993. On these occasions, the government continued to advise the Court it was in the process of additional investigation and would be pursuing a superseding indictment. Defendant Mann had a substitution of counsel, and counsel for Defendant Mann also requested additional time to prepare for trial.[1] On June 30, 1993, one week before the July 6, 1993 trial setting, the government again avoided trial by obtaining another superseding indictment, which again included the same five defendants before the Court in May 1992. In a pretrial hearing on September 24, 1993, the Court set this cause for trial on January 4, 1994. The government and defense counsel were all present and agreed to the date.

Because the government and defense counsel have represented to the Court

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[1]It was represented to the Court that Defendant Mann's substitution of counsel was necessary as a result of the government's intention to subpoena lawyers and/or records from Defendant Mann's original counsel.

that trial of the cause will take months, the Court, despite its heavy criminal docket and Speedy Trial Act concerns on several causes, blocked this mutually acceptable period of time to try this cause and has made every effort to meet the schedule by scheduling frequent pretrial hearings and rescheduling its docket. In these pretrial hearings the issue of whether the documents had to be produced was addressed several times. The chronology of motions, arguments, and rulings is set forth in the Court's December 20, 1993 order and the transcripts of the September 24, November 19, and December 17, 1993 hearings. Therefore, the Court will not restate the entire history in this order. However, the Court will briefly outline the pertinent dates and statements.

Defendant Moore raised the issue in a discovery motion, in which he specifically requested copies of the "trial notebook disclosed to him by the government. At the September 24, 1993 hearing, the Assistant United States Attorney stated that the "trial notebook" was a case agent's report and that, although he did not want to produce the report to the Defendants, "in an effort to get them in the case and to understand what we are doing I've let everybody look at it." See Sept. 24, 1992 Hearing Transcript, at 15. He stated further that he "put an end" to allowing access

to the case agent's report when a law clerk began copying verbatim from the report. *Id.* at 16. Based on counsels' representations that there were no discovery problems and the government had been accommodating defense counsels' requests, the Court attempted to settle the dispute in a mutually satisfactory manner by dismissing Defendant Moore's motion without prejudice but allowing the Defendants to review the report previously disclosed at the government's offices. *Id.*; see *also* Court's Sept. 27, 1993 Order.

Defendant Moore filed his motion to [sic] for inspection and copying of the documents on October 5, 1993, in which he reurged his argument that the government had waived any privilege related to the documents by its voluntary disclosure of the documents in question. In the November 19, 1993 pretrial hearing, the Assistant United States Attorney apprised the Court that actually two separate case agents' reports were now at issue. Be stated however, "I'll be glad to give them what they have seen, if they will just show us -- tell us what they have seen, we'll give them that part of it. That ought to solve it."[2] See

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[2] At the December 20, 1993 hearing, the Assistant United States Attorney stated the "them.' he was referring to in the statement was limited to Defendant

Nov. 19, 1993 Hearing Transcript, at 20. The Court granted Defendant Moore's motion and ordered the government to produce the documents in question. See Nov. 23, 1993 Order; *see also* Court's Dec. 20, 1993 Order, at 3-4.

Upon the Court's oral ruling granting the motion, the government reurged its concern about the sensitive and confidential nature of information regarding third parties contained in the documents. The Court, therefore, instructed the government to present the notebooks to the Court for *in* camera inspection with a list or designation of the portions containing sensitive information so the Court could determine which portions, if any, should be redacted and what type of protective order should be issued. See *id*.

The government presented the notebooks to the Court on December 10, 1993, a week before the final pretrial motions hearing set in the cause. At that time, the government represented that providing the Court with the requested list or designation was an impossible task because much of the information was closely interrelated and intertwined. The Court, therefore, requested the Assistant United States Attorney to draft

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Moore and his counsel. However, the Court understood "them.' to relate to all defense counsel.

an appropriate protective order to be entered at the time of disclosure. The Assistant United States Attorney indicated he would do so.

However, also on December 10, 1993, the government filed a motion requesting the Court to reconsider its previous orders directing disclosure of the special agents' reports. At the hearing on December 17, 1993, the government again represented that attorneys for the Defendants were given the opportunity to see the reports and reviewed them. See Dec. 17, 1993 Hearing Transcript, at 27-28. However, when the Court overruled the Government's motion to reconsider, the Assistant United States Attorney stated he was forced to respectfully decline to comply with the Court's order. See *id.* at 26; see *also* Court's Dec. 20, 1993 Order, at 5.-

Subsequently, a letter from the Assistant United States Attorney, delivered to the Court late the afternoon of December 17, 1993, raised questions of which documents had been disclosed and which Defendants were entitled to disclosure. See Court Exh. 1 (Letter from Blankinship to Sparks, Dec. 17, 1993). Therefore, the Court determined a need existed for an evidentiary hearing to determine what documents had been previously disclosed and which Defendants had received the disclosure. The Court, in

an effort to keep the trial date on schedule despite the government's stated intention not to comply with the Court's order, set the hearing for December 28, 1993.

II. The Evidentiary Bearing

Although the hearing lasted several hours and involved testimony from one special agent, the Assistant United States Attorney, and one defense counsel, the Court finds the testimony of the Assistant United States Attorney to be dispositive of the issue. The Assistant United States Attorney did not dispute that the government had provided defense counsel with access to the documents. In fact, the Assistant United States Attorney testified that counsel for the Defendants all had access to one or both of the case agents' reports, or reviewed one or both of the case agents' reports.[3] The Assistant

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[3]The agents' reports were marked as Court exhibits during the evidentiary hearing. Court Exhibit 3 is Special Agent Walter Mazur's report prepared in conjunction with his investigation of the five Defendants. Court Exhibit 4 is Special Agent Howard Brooks's report prepared in conjunction with the tax investigation of Defendant Mann.

The Assistant United States Attorney

United States Attorney argued however, that with the exception of counsel for Defendant Gallaher, the access to the notebooks was provided before the indictment in this cause was issued; defense counsel had not been allowed access to the documents since the June 1993 indictment was issued. Defendant Gallaher's counsel, who became involved in the cause when the latest indictment was issued, was provided with an opportunity to view the documents to assist him assessing the case against his client. However, as the Court noted above, the dismissal and subsequent reindictment was a tactic employed by the government to avoid a trial date. The Court will not allow this tactic to be used to preclude the Defendants from inspecting and copying the same documents shown to them by the government in the preceding cause number.

The Assistant United States Attorney

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testified that either current or previous counsel for Defendant's Gallaher, Moore, and Mann had been provided access to both reports. Defendant Christensen's counsel had reviewed Special Agent Mazur's report. The Assistant United States Attorney did not recall what Defendant Alsup's attorney had reviewed. However, Defendant Alsup was severed from this cause by oral order issued in the December 17, 1993 pretrial motions hearing

also argued that because Defendant Moore was the only defendant who actually filed a motion requesting the documents, he is the only Defendant entitled to the documents. The Court finds this argument to be without merit in this complex, multi-defendant, multi-charge cause covering an extended period of time and involving two conspiracy counts charging all five defendants.[4] One or both of the notebooks containing the documents were made available to defense counsel for all

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[4]The current indictment contains thirty-nine counts, which include allegations regarding the operation of savings and loan institutions, as well as conspiracy and tax violations. The charges stem from acts beginning in 1982; the government has conceded the statute of limitations has run on one of acts charged in "ne of the conspiracies. See Government's Response to Motion of Defendant Christensen to Dismiss Count One for Failure to Comply with the Statute of Limitations, at 3. The government has already provided approximately 6000 pages of documents and an additional 6000 pages of deposition.testimony to each defendant. See Dec. 17, 1993 Hearing Transcript, at 32. The magnitude of document involved in this cause underscores the importance of the documents previously disclosed to defense counsel.

Defendants; in a case of this nature, it is inefficient and nonsensical to limit the disclosure to only the Defendant filing a formal motion.[5]

The Assistant United States Attorney reurged his argument that work-product doctrine does not apply to case agents' reports, which are exempt from disclosure under Federal Rule of Criminal Procedure 16(a)(2). The Court, in its December 20 order, set forth the legal basis for requiring disclosure in this case. See Dec. 20, 1993 Order, at 7-11. During the evidentiary hearing, the government offered no additional authority or analysis" other than that presented in its original motion to reconsider.[6] Based on the Assistant United States Attorney's testimony that he had previously provided all defense counsel with access to one or both of the reports,the Court affirms its order of disclosure, for the reasons set

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[5]The Court notes that Defendant Christensen has filed a motion, albeit past the Court's deadline, requesting disclosure of the documents.

[6]The government made no effort to address the Supreme Court's holding in *United States V. Nobles,* 422 U.S. 225, 236-239 (1975) (work-product doctrine applies to criminal litigation and privilege derived from doctrine may be waived).

forth on pages seven through eleven of the Court's December 20, 1993 order.

In addition to the legal basis for the Court's order of disclosure, the Court believes notions of fairness essential to criminal justice compel the same result. The government has represented that it has a liberal discovery policy and that it has made every effort to accommodate appropriate discovery requests of defense counsel. By its own admission, the government allowed cases agents' reports, normally exempted from disclosure by Federal Rule of Criminal Procedure 16(a), to be reviewed by defense counsel. The government has admitted it allowed counsel to take notes from the documents without limitation, provided the notes were not verbatim copies.[7] The government has represented this practice was allowed to apprise defense counsel of the strength of the government's case in an effort to facilitate plea negotiations. However, it appears that once the government determined a Defendant would not plead guilty, the previously accessible documents were withheld.

The Court believes such a practice to be contrary to the notion of fairness

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[7]The Court is unsure of the degree of copious note-taking required to cross the line to verbatim copying, much less how such a rule could be objectively applied.

essential to attaining justice in criminal trials. Defendants are entitled to understand the charges against them and to know the government's case against them before trial. If the government voluntarily chooses to provide defendants with information, despite its privileged nature, the government may not withhold the information as punishment for not pleading guilty. Such a practice is akin to trial by ambush or ploy, rather than the fair trial to which all defendants are entitled.

Further, the Court has reviewed the documents in question. The information at issue is of the type appropriately disclosed to defendants in some form. The Court found no information contained in the documents, and the government has not directed the Court's attention to any information in the documents, that would prejudice the government's right to a fair trial.[8]

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[8]At the evidentiary hearing, the Assistant United States Attorney contended the agents' thought processes are contained in the reports and this disclosure would allow the Defendants to "adapt.' their testimony. Yet, the agents met with defense counsel, at times for hours and often without government counsel's presence, to show defense counsel the strength of the government's case. Additionally, the Defendants will

III. Conclusion

The Court has made every effort to bring this cause to trial. Once again, however, the Court and the parties are faced with the possibility of delay as a result of the government's actions. This cause has been pending in some fashion since September 1991. The government has deliberately delayed trial on pending indictments on July 6, 1992, by obtaining a superseding indictment; on August 17, 1992, by dismissing the pending indictment; on July 6, 1993, by obtaining another superseding indictment; and now, on January 4, 1994, by refusing to comply with this Court's orders and provide copies of documents previously disclosed to defense counsel. The Court does not have an indefinite amount of time to devote to scheduling and rescheduling a multi-month trial. The Court, to accommodate the January 4, 1993 trial date in this cause, has already had to address Speedy Trial Act concerns on several other causes in an effort to avoid dismissals.[9]

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have heard all the evidence the government intends to offer before testifying themselves.

[9]The Court recently completed two lengthy criminal trials: *United States V. Moeller, et al.*, A-91-CR-001, and *United States V. Craven Laboratories, Inc., et*

If the government refuses to comply with this order and the Court's December 20, 1993 order, the Court will be forced to choose between holding the government's attorneys in contempt and dismissing the cause. However, the Court believes trial counsels' refusal to comply with this Court's order is the result of restraints placed upon then by others, and, therefore, contempt would be inappropriate in this case. See Nov. 19, 1993 Hearing Transcript, at 21-22. Further, because of the tight schedule created in the Court's docket by blocking the time for trial of this very cause, the Court would not be able to schedule a new trial date in compliance with the Speedy Trial Act if the currently scheduled trial date is

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al., A-92-CR-152. Moeller, which was scheduled for six weeks, began on September 20, 1993, and was completed in four weeks. *Craven Labs* was scheduled for four weeks and began on November 29, 1993.

In addition to this cause, the following causes are set for docket call in this Court on January 4, 1993: *United States V. Ball,* A-93-CR-43; *United States V.* Imbert, A-92-CR-66(3); *United States V. Harper,* A-93-CR-103; *United States V. Rosales & Schreiber,* A-93-CR-144; *United States V. Levine,* A-93-CR-145; *United States V. Rogers,* A-93-CR-147; *United States V. Rodriguez,*A-93-CR-149.

passed. Therefore, the Court believes dismissal of the cause is the only viable option available to the Court. Accordingly, the Court enters the following order:

IT IS ORDERED that the government deliver both special agents' reports contained in Court Exhibits 3 and 4 to defense counsel on or before Thursday, December 30, 1993, at 5:00 p.m., subject to the protective order set forth in the Court's December 20, 1993 order. As indicated in open court, if the government fails to comply with this order, the Court will dismiss this cause of action on Monday, January 3, 1993.

SIGNED this the 29th day of December 1993.

s/_____
SAM SPARKS
UNITED STAT ES
DISTRICT JUDGE

FILED JAN 3 12:24 PM '94 U.S. CLERK'S OFFICE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. () #A92CR129(1-5)SS

PETER K. GALLAHER,
WILLIAM MARVIN MOORE,
JULIAN CLIFFORD ALSUP,
CHARLES M.CHRISTENSEN,
JAMES SCOTT MANN, III,

Defendants.

ORDER

BE IT REMEMBERED on this the 3rd day of January 1994 the "Government's Response to Order of December 29, 1993" was presented to and reviewed by the undersigned and, recalling the many docket calls relating to trial settings in this case and its predecessor, the Court is confident the transcripts of those hearings will establish the representations of government counsel as to various estimates of time trial and, further, establish that the government has never been ready for trial to date, notwithstanding the original indictment in September 1991. Perhaps, if the history of this case did not included trial settings of July 6, 1992; August 17, 1992; July 6, 1993; and January 4, 1994 where intentional conduct of the

government prevented trial by superseding indictments and dismissal of an indictment, the appropriate remedy of the government's refusal to comply with the order of this Court would be contempt rather than dismissal. However, the courtroom is supposed to be a sanctuary where all parties receive impartial justice. These Defendants have now been under indictment and Government prosecution since at least September 1991 without the benefit of a trial. Some factual allegations in the indictment are now twelve years old. Now, the government prevents trial by refusal to comply with an order of disclosure, with appropriate protective order, of documents -- agents reports that were freely permitted review by Defendants and their counsel, as admitted in open court and corroborated by the letter attached to the Government's response. See Letter from Blankinship to Sparks, et al., July 23, 1992, at 2 ("[O]ne of Mr. Mann's attorneys, has already reviewed the Special Agent's report relating to the mew tax charges. Discovery relating to the new charges, in part, is in process, because the subject matter of the pending indictment is intertwined with the new charges. Liberal discovery will continue uninterrupted.")

This Court is most reluctant to dismiss criminal charges brought by indictment and does not do so lightly.

However, the Court cannot condone the government's conduct. Dismissal is the appropriate remedy under these circumstances.

IT IS ORDERED that the indictment in the above-styled cause is DISMISSED for the refusal of the United States Attorney to comply with the order of this Court and the government's conduct in preventing trial in this cause.

SIGNED this the 3rd day of January 1994.

s/_____
UNITED STATES
DISTRICT JUDGE

UNITED STATES of America,
Plaintiff-Appellant,

v.

James Scott MANN, III, Peter K. Gallaher, William M. Moore, Julian C. Alsup, and Charles Christensen, Defendants-Appel- lees.

No.94-50082.

United States Court of Appeals,
Fifth Circuit.
Aug. 3, 1995.

Government appealed from order of the United States District Court for the Western District of Texas, Sam Sparks, J., which dismissed indictment because of discovery violation. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) Court had jurisdiction; (2) work product waiver rule does not apply to internal reports of government agents other than attorneys, but general rules governing waiver are applicable; and (3) when defense breached condition imposed by government on its waiver of privilege, obligation of government terminated and government could again assert the privilege.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before VAN GRAAFEILAND,* JOLLY and WIENER, Circuit Judges.

E.GRADY JOLLY, Circuit Judge:

The district court dismissed the indictment in this case because, after several delays in bringing the case to trial, the government failed to comply with the district court's order to disclose documents. The government had allowed the defendants access to the documents upon a non-copying condition, but withdrew access when they discovered that the defendants were copying the documents. We hold that the documents were privileged against disclosure under Fed.R.Crim.P. 16(a)(2), and although the government may have conditionally waived its privilege, the defendants breached the agreement. The government, therefore, had the right to reassert its privilege against disclosure. Thus, because the government properly exercised its privilege against disclosure under Rule 16(a)(2), the district court abused its discretion when it dismissed the indictment. Consequently, we reverse the district court's dismissal of the indictment, and remand the case.

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*Circuit Judge of the Second Circuit, sitting by designation.

I.

This case has its genesis in the 1980s, during which time the defendants were involved in a series of allegedly fraudulent transactions regarding the sale of a Texas savings and loan institution and the exchange of certain parcels of real estate. The main focus of this appeal and our attention today, however, is on the pretrial investigation and the discovery that began shortly before most of the defendants were initially indicted in September 1991, and continued until shortly before the district court's dismissal of the third superseding indictment in January 1994. We now turn to examine the events shaping this controversy in greater detail.

This case has involved a series of indictments, dismissals, and reindictments, which evidence the complex nature of the case against the defendants, and which contributed to the frustration of the district court. In September 1991, the grand jury returned a twelve-count indictment charging Peter K. Gallaher, William M. Moore, Charles M. Christensen, and Julian C. Alsup[1] with filing false

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[1]The case against Alsup was severed by the district court on the same day in January 1994 that the court dismissed the final superseding indictment against the

corporate tax returns in violation of 26 U.S.C. § 7206(1), (2) from 1984 through 1990. The district court set trial for April 20, 1992. The following January, the case was reassigned to the Honorable Sam Sparks. In response to motions for continuance by defendants Alsup and Christensen and in anticipation of a superseding indictment, the district court set trial for July 6, 1992. As anticipated, the grand jury returned a superseding indictment in April that added appellee J. Scott Mann to the case and included additional charges of fraud and conspiracy in connection with a failed savings and loan association, in violation of 18 U.S.C. § 371. After three parties moved for a continuance, the district court rescheduled the trial for August 17, 1992. On August 5, however, the government dismissed the superseding indictment. At that time, the grand jury returned a new indictment, which contained only three counts and charged only Mann with tax-related offenses.[2] Mann's trial on these

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other parties. Alsup, therefore, is not a party to this appeal.

[2]Mann was charged with violations of 26 U.S.C. sec. 7206(1)(false corporate tax return), 26 U.S.C. sec. 7203 (failure to file a corporate tax return), and 26 U.S.C. sec. 7206(1) (false personal income tax return).

charges was subsequently set for November 1992, with the Honorable James R. Nowlin presiding. On October 22, Mann's case was reassigned to Judge Sparks. At a hearing on November 5, Judge Sparks allowed Mann to substitute his counsel and was informed by the government that it was seeking another superseding indictment. Subsequently, the court granted Mann's motion for a continuance, rescheduling the trial for December 21. At a December 11 motions hearing, the government informed the court that it was still working on the superseding indictment. On December 18, Mann's counsel filed a motion for a continuance to allow him more time to examine the evidence. On December 22, the court granted Mann's motion for continuance, and set the case for trial on March 1, 1993. On February 24, 1993, the district court filed an amended order, rescheduling the trial for March 29,1993. At docket call on March 1, the government told the court that it was still pursuing a superseding indictment, expected by July. On March 11, the district court entered an order rescheduling Mann's trial for July 5 because his counsel needed additional time to prepare his defense. On June 30, the grand jurv issued the thirty-nine count superseding indictment that is the subject of this appeal.[3] After

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[3]The indictment charged all the defendants, Gallaher, Moore, Alsup,

a discovery motion hearing on September 24,1993, the court set the trial date as January 4, 1994.

In the meantime, plea negotiations were ongoing. Before the first indictment had issued in September 1991, the government had met with the defendants and their attorneys on several occasions to discuss the case. As a part of these discussions, the government had allowed the defendants to inspect portions of government agents' reports[4] that included assessments of the strength of the case, and that were

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Christensen, and Mann with thirty-nine counts based upon the following code violations: (1) 18 U.S.C. sec. 371 (conspiracy to defraud a savings and loan, the Federal Home Loan Bank Board, and the Internal Revenue Service); (2) 18 U.S.C. sec. 1006 (false entries in savings books); (3) 18 U.S.C. sec. 1014 (false statements to banks); (4) 26 U.S.C. sec. 7206 (false tax returns); (5) 18 U.S.C. sec. 657 (misapplication of savings funds); (6) 18 U.S.C. sec. 1006 (fraudulent participation in savings transactions); (7) 18 U.S.C. sec. 215(a) (receipt of commission for procuring loan); and (8) 26 U.S.C. sec. 7203 (willful failure to file tax return).

[4]These were the reports of the Internal Revenue Service's Special Agents Walter Mazur and Howard Brooks.

otherwise not discoverable under Rule 16(a)(2). In addition to the exposure of these documents, Agent Mazur copied approximately 150 pages of his report, termed the "evidence" or "factual" section and placed it on file with the government's other evidence to which the defendants were given access in order to allow the defendants to better understand the cases against them. Apparently, a portion of Agent Brooks's report was also deposited with the government's evidence, composed of hundreds of volumes of materials.

Although the record does not contain a formal agreement governing access to these documents and the agents' reports, the record reflects that early in the discovery process certain "rules of engagement" were established. The district court was aware of these rules because on several occasions the government referenced these informal rules in its pleadings and correspondence. For instance, in its January 24,1992 Response to Pretrial Motions Filed by Defendant William Moore, the government stated that it had agreed to informally provide all discovery to which Defendant Moore is entitled pursuant to the Federal Rules of Criminal Procedure and the laws and Constitution of the United States. Further, the government has informally agreed to provide discovery of materials to which Defendant Moore is not entitled

under the above cited authorities.

Supplemental Record on Appeal, Vol. I, at 103. In its January 24, 1992 Response to Pretrial Motions Filed by Defendant Peter Gallaher, the government states that "[i]t is the policy of the prosecutor assigued to this case to facilitate discovery whenever possible. To that end, counsel for Mr. Gallaher has been allowed to examine the Special Agent's report prepared by Walter Mazur of the Internal Revenue Service." *Id.* at 105.

In other pleadings, the government was more specific as to the parameters of the rules, using the same language to describe access to the materials on two different occasions:

> [t]he government will voluntarily allow all defendants in this cause to examine and copy evidence which the government has accumulated during its investigation. The only exceptions are items submitted to the government with a reservation of the attorney-client privilege. Counsel for the defendants may examine the government's files at the Federal Building, 300 East 8th Street, Austin, Texas. The files are in the custody of Walter Mazur, Special Agent, Internal Revenue Service, Criminal Investigation Division. . . . A

> copier is available to the, defendants' attorneys. A fee of 10 cents per page will be charged.
>
> The government has previously allowed attorneys to examine Agent Mazur's report. The government will continue to allow counsel to *review* the factual portion of the report, but the report *may not be* copied *and* must *remain* on government *premises at 100 East Eighth Street, Austin, Texas.*

May 13,1992 Response to Pre-Trial Motions Filed by Defendants Mann and Gallaher, (Supplemental Record on Appeal, Vol.11, at 74-75 (emphasis added); June 9,1992 Repenge to Pre-Trial Motions Filed by Defendant Christensen, Supplemental Record on Appeal, Vol.11, at 421-22 (emphasis added). Moreover, early in the discovery process, the government orally told the court that it was giving the defendants restricted access to portions of the special agents' reports. In a June 10, 1992 pretrial motion hearing, the government stated that

> we have given the attorneys access to Mr. Mazur's investigative reports. . . We *intend* to give the attorneys access throughout [the discovery

> process to the factual portions of that report. Now there's some theory and that sort of thing in there that we are going to hold back, but the factual portions that will lead them into the evidence, that the government has accumulated will remain open to them.

Record on Appeal, Vol. V at 12 (emphasis added).

As the record reflects, the defendants were allowed to examine the evidence portion of the investigative reports, but specifically were prohibited from copying these reports. Up to July 1992, the defendants had access to these investigative reports, as well as documentary evidence in the basement of the federal government building in Austin, Texas. On July 6, however, the government discovered a representative of one of the defendants hand-copying verbatim from the evidence portion of one of the reports, in direct contravention to the informal rules of access established for the documents. This act prompted the government to deny access to the agents' reports to all defendants in the case.[5] The government,

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[5]The government, however, made an exception to this rule for Gallaher's substituted counsel, whom the court had

nevertheless, continued to offer access to the other documents involved in the case. Apparently, the defendants did not raise an immediate objection to this denial of access.

On August 4, 1992, the indictment under which this discovery had been proceeding was voluntarily dismissed by the government. A superseding indictment against only Mann was issued in mid-August[6] so that Gallaher, Moore, Alsup, and Christensen, at that point, were no longer involved in discovery. The government allowed Mann to have access to government documents, but withheld access to the special agents' reports. The record does not reflect that Mann expressed any objection to this denial of access.

On June 30, 1993, almost one year later, the government obtained the superseding indictment that is at issue in this case. See Note 3 *supra*. In connection with this indictment, the government

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appointed on July 30, 1993, to replace previous counsel. Because the counsel came into the case late, the government gave him access to the special agents' reports on several occasions so that he could understand the nature of the government's case. The government also made clear to him that it would not allow the reports to be copied.

[6]See Note 2 supra.

continued to practice the open discovery policy it had previously employed with these defendants. The government agent reports, however, were not among the documents to which the defendants were given access.

On October 5, 1993, over one year after access to the government agents' reports was curtailed, appellee Moore filed a motion for discovery, inspection, and copying of exculpatory evidence, in an effort to obtain the investigative reports. Moore contended that the government bad waived any privilege by disclosing the reports during earlier plea negotiations. After a hearing on November 19, the district court found that the government, "by appropriately cooperating with defense counsel in the discovery process, has allowed the defendants' counsel to inspect the notebook and therefore has waived any work product privilege." Thus, the district court granted Moore's motion on November 24 and ordered the government to present the reports for an *in camera* inspection so that the court could determine what parts of the agents' reports, if any, could be redacted pursuant to a protective order. When the government tendered the reports to the court on December 10 for the inspection, it asked the court to reconsider its disclosure order, reminding the court that Fed. R.Crim.P. 16(a)(2) specifically makes

these reports undiscoverable. On December 17, the court held another heating and orally denied the government's motion for reconsideration. As a result, the court again ordered the government to disclose the agents' reports because the previous disclosures had been inconsistent with the government's work product privilege, even though the government had argued that these documents were exempt from disclosure under Rule 16(a)(2). The court then scheduled an evidentiary hearing for December 28 to determine which documents had been disclosed. After this hearing, rather than consider the alternative of holding the government in contempt, the district court entered an order on December 29 requiring the government to produce the reports, having stated in the hearing that even if there were rules governing access to the documents, the government had waived any privilege it had to the documents. See Record at Vol. XII, p.9[7]. The court also warned that it would dismiss the indictment if the government did not comply, with its order. The government did not comply, and the court dismissed the indictment on January 3, 1994. This appeal followed.

II.

The parties raise three issues on appeal All of the appellees, except Gallaher, first contend that this court is

without jurisdiction to hear this appeal. The government, as appellant, presents two contentions: first, it contends that the district court erred in ordering the government to provide the defendants with copies of the special agents' reports that were exempt from pretrial discovery under Fed.R.Crim.P. 16(a)(2); second, it argues that the district court abused its discretion in dismissing the indictment based on the government's refusal to provide copies of the agents' reports to the defendants.

We will address each issue in turn.

III

A

[1] We first must address the defendants' argument that this court does not have appellate jurisdiction over this matter. This argument plainly lacks merit. This appeal is authorized by 18 U.S.C. sec. 3731, which permits the government to appeal from "an order of a district court dismissing an indictment," providing, however, "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The defendants argue that the double jeopardy clause prohibits this appeal. The defendants concede, as they must, that jeopardy has not attached because a jury has not yet been empaneled and sworn. *See United Stetes v. Juarez-Fierro,* 935 F.2d 672, 675

(5th Cir.1991). They cite no authority in support of their argument, but urge this court to adopt a functional approach to double jeopardy analysis. As stated above, this argument has no merit. Accordingly, because the government's appeal is authorized by § 3731, we have appellate jurisdiction.

B

[2] Now let us determine whether the district court erred when it ordered the government to produce documents in question. We review the district court's actions in this discovery setting for an abuse of discretion. *United* Stetes *v. Sercinelli* 667 F.2d 5 (5th Clr.1982).

[3] We begin with an examination of the plain language of Rule 16(a)(2). Under the heading, "Information Not Subject to Disclosure," Rule 16(a)(2) states that, with exceptions not relevant here, "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case." (Emphasis added). As an internal government document produced by government agents in connection with the investigation of this case, the reports at issue clearly fall within the ambit of this rule, and thus are exempted from discovery.

The Advisory Committee Notes cast more light on the purpose of the rule. The 1974 Amendment Notes state that the phrase "reports, memoranda, or other internal government documents made by the attorney for the government" was meant to incorporate the "work product" language of *Hickman v. Taylor* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451(1947), into the rule to ensure that government attorneys' litigation preparations are protected from discovery. The Notes, however, say nothing about the work product privilege, as it is understood in *Hickman,* being made applicable to the internal government documents produced by other govern'ment agents.

[4, 5] The defendants argue that *United States V. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141(1975), made the work product privilege fully applicable to criminal cases, and, thus, its walver rules apply here. It is true that the work product privilege does apply in criminal cases. We disagree, however, with the defendants' characterization of the extent to which *Nobles* expands this privilege to cover documents made expressly nondiscoverable in Rule 16(a)(2). *Nobles* was concerned only with the *defendant's* work product. The scope of pre-trial discoverability of internal government documents, as set forth in Rule 16, was not at issue. Put another way, *Nobles,* which was not concerned with Rule

16(a)(2), cannot be read te alter the plain language of a rule it did not address. We should further observe that at the time of the *Nobles* decision, the work product language that the defendants assert to support their argument had not yet been incorporated into Rule 16(a)(2). In short, we do not think that *Nobles* expands the attorney work product privilege to other government agent internal reports, such as those contemplated in Rule 16(a)(2).

Although we decline to extend the rules of the waiver of attorney work product privilege to the context of the case before us, we find that the. general rules regarding waiver are applicable. *See United States V. Mezzanatto,* ___ U.S.___, 115 S.Ct. 797, 801"02, 130 L.Ed.2d 697 (1995) (The provisions of the Federal Rules of Criminal Procedure are "presumptively waivable" by a voluntary agreement of the parties.). "A waiver is a voluntary and intentional relinquishment of a known right or conduct that warrants an inference of such a relinquishment." *Highlands Ins.* Co. V. *Allstate Ins. Ca,* 688 F.2d 398, 404 (5th Cir.1982); *see also Birdwell v. Skeen,* 983 F.2d 1332, 1340 (5th Clr.1993). Rule 16(a)(2) clearly exempts certain types of government materials from discovery, with the reports at issue being among them. The defendants argue that when the government allowed them to inspect the agents' reports, it

waived the privilege against disclosure. The district court agreed and found that notwithstanding the establishment of any conditions governing the access to the special agents' reports, the government waived the privilege of nondiscoverability upon once disclosing the reports to the defendants. After looking at the general principles of waiver and the government's conduct in this proceeding, we conclude that the district court erred.

[6, 7]From the very first, the government put certain conditions on the defendants' access to these reports. During plea negotiations in 1991, the government attorneys and special agents were present when the defendants and their attorneys reviewed the reports. Furthermore, the defendants were only given access to a portion of the reports. Although other documents were allowed to be copied, with the government even providing a copying machine, the government made clear that these reports, which are indeed protected by Rule 16(a)(2), could not be copied.[7]

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[7]The defendants argue that the government's rules governing the copying of the reports are ambiguous. They assert that the rules are susceptible to an interpretation allowing hand-copying, but disallowing photocopying. We reject this argument out of hand. The plain language of the correspondence from the

Moreover, along with other documents, the government controlled the access to the reports and would not allow the parties to transport them from government facilities. From the start, the defendants agreed to the terms of this restrictive arrangement. So long as the defendants complied, the government permitted access. Only when the government discovered one of the parties hand-copying, verbatim, from the reports did it withdraw the restricted access to these reports that it had granted earlier. In the light of these facts, we conclude that, even assuming the government's conduct satisfies the principles of waiver generally, the government did not waive its Rule 16(a)(2) privilege absolutely. Instead, it waived the rule's protections conditionally; that is, the government agreed to suspend Rule 16(a)(2) so long as the defendants did not copy the privileged materials. When this condition was breached, however, the obligation of the government terminated, the parties returned to the *status quo ante*, and the government was, therefore, free to reassert its Rule 16(a)(2) privilege against disclosure.

Although this particular question of waiver has seldom been addressed, courts that have been confronted with a Rule 16(a)(2) question have read the rule te

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government disallows "copying," which would include any manner of reproduction.

prohibit forced disclosure of this type of government work product. *See United States V. Lov-It Creamery, Inc.*, 704 F.Supp. 1532 (E.D.Wisc.1989); *see also United States V. Williams*, 998 F.2d 258, 268 n. 23 (5th Clr.1993) ("[Rule 16(a)(2)) specifically provides that 'internal' memoranda and reports prepared by the government in the preparation of its case are not discoverable."). Furthermore, other courts have recognized the binduing power of these informal discovery agreements. *See United States V. Cole*, 857 F.2d 971, 976 (4th Cir. 1988). Other cases have held that although the government allowed defendants to view certain documents covered by Rule 16(a)(2), or a similar state rule, no waiver of the privilege against disclosure occurred. *See United States V. Penix*, 516 F.Supp. 248 (W.D.Okla.1951); *Indiana ex rel Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146 (Ind.1985).

C

Finally, in the light of our opinion above, the district court's error in dismissal of the indictment is now self-evident, considering our conclusion that the government did not waive absolutely its Rule 16(a)(2) privilege against nondisclosure. Because we hold that the government acted within its Rule 16(a)(2) protections, the court was without the power to impose the extreme penalty of dismissal of the indictment.

Consequently, the district court abused its discretion, and the order of dismissal must be reversed.

IV

To sum up, we hold that we have jurisdiction to entertain this appeal. Furthermore, we hold that the government properly asserted its privilege against disclosure under Rule 16(a)(2). Thus, the district court abused its discretion when it ordered a dismissal of the indictment.[8]

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[8]When the district court dismissed the indictment, it also noted that the government had engaged in other unjustifiable delay. The court further indicated that this background of additional delay had influenced its decision to dismiss the indictment. It is nevertheless clear, however, that only the added factor of the government's refusal to disclose moved the judge to actually dismiss the indictment. No record was made that would allow us to review the court's finding of fault against the government for other delays encountered during the case. Thus, the only issue we decide in this appeal is that the district court erred by dismissing the indictment based on the government's failure to disclose the agents' reports. This opinion does not affect the right of the district court to

For the foregoing reasons, the district court's order dismissing the indictment is

REVERSED and REMANDED.

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reconsider on remand any other alleged misconduct on the part of the government and, if justified, to take appropriate action.

U.S. COURT OF APPEALS FILED SEP 21 1995

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50082

UNITED STATES OF AMERICA,

Plaintiff-
Appellant,

versus

JAMES SCOTT MANN, III,
PETER K. GALLAHER,
WILLIAM M. MOORE, JULIAN C.
ALSUP and CHARLES CHRISTENSEN,
Defendants-
Appellees.

Appeal from the United States District Court for the Western District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC
(Opinion 8/3/95, 5 Cir. , 1995, _____ F.3d _____)
(Sept. 21, 1995)

Before VAN GRAAFEILAND*, JOLLY and WIENER, Circuit Judges. PER CURIAM:

(X) Treating the Suggestions for

Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

( )Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE
COURT

s/_____
United States Circuit Judge

*Circuit Judge of the Second Circuit, sitting by designation.

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